

**B.A.LL.B. Vth Semester**  
**Constitutional Law of India - I (Nature of The Constitution And**  
**Fundamental Rights)**  
**BL-5003**

**Concept of State under Article 12 of the Indian Constitution**

The concept of State Action is not defined in the Constitution rather it is a concept which is implied in Article 12 of the Constitution of India. The Article is the first article in Part III of the Constitution and it enlists the fundamental rights guaranteed to the people. Defining State was necessary as the Fundamental Rights are expressly guaranteed against the State.

‘Every State is known by the right that it maintains.’<sup>1</sup> Just as a written law evolved from the concept of natural law as a higher law so the Fundamental Rights may be said to have sprung from the doctrine of natural rights. 2 As the Indian Supreme Court has put it “Fundamental Rights are the modern name for what have been traditionally known as natural rights.”<sup>2</sup> The political implication of the theory of natural rights is that these rights being inherent in man existed even prior to the birth of the State itself and cannot, therefore, be violated by the State.

The definition of the term State under Article 12 is inclusive and not exhaustive. The language of Article contains two important flexibility terms to cope up with the challenges posed by the society. The first one is the “inclusive nature” of the definition, which is evident through the use of the expression “includes” which can be used to accommodate new entities within the scope of Article 12. Therefore, authorities not specified in the Article may also fall within it if they otherwise satisfy the characteristic of the ‘State’ or if they perform any functions ordinarily performed by the Government. The second is use of the expression “unless the context otherwise” that allows the use of the concept of State in different situations in different manner and context.

The doctrine of state action is not defined in the Indian Constitution rather it is implied in Article 12 of which defines State for the purpose of Part III. It enumerates a list of authorities against which fundamental rights can be enforced by invoking the writ jurisdiction if Supreme Court and High Court. As per the Article, State includes the Government and Parliament of India and government and legislatures of each state in India. It also includes local and other authorities

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<sup>1</sup> Harold J. Laski, A Grammar Of Politics (1925).

<sup>2</sup> (In The Words Of Blackstone Natural Rights Were Founded On Nature And Reason So They Coeval With Form Of Government) Blackstone Commentaries 127-28 (1765).

within the territory of India and local and other authorities under the control of Government of India.<sup>3</sup>

#### **(a) Government and the Legislatures**

It is explicitly mentioned in Article 12 that State includes Parliament of India and the State Legislature and State Executive by virtue of the functions and powers exercised by these bodies. Besides, Article 32 empowers the Supreme Court to issue writs against the Government of India as well as the State Government and also Article 226 expressly includes government as one of the persons against whom a writ may be issued.<sup>4</sup>

#### **(b) Authorities under the Control of Government of India**

Local Authorities- The expression 'local authorities' has not been defined in the Constitution but is defined in the General Clauses Act, 1897 so as to include municipal committee, district board, body of port commissioners or other authorities. These bodies must be legally entitled to or entrusted by the Government with the control or management of municipal fund. Thus autonomy regarding the affairs financial as well as administrative is necessary to fall under the term 'local authority' under Article 12.<sup>5</sup>

#### **(c) Other Authorities**

Article 12 ends up enumerating the authorities under Article 12 by referring finally 'other authorities' within the territory of India and under the control of government of India. The term 'authority' is defined as the person or persons in whom government or command is vested.<sup>6</sup> It is also defined as a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise.<sup>7</sup> This dictionary meaning of the word is clearly wide enough to include all bodies created by a statute on which powers are confined to carry out governmental or quasi-governmental functions and it was quoted with approval by the Constitutional Bench in Rajasthan State Electricity Board.

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<sup>3</sup> Constitution Of India Art. 12 ("In This Part, Unless The Context Otherwise Requires, 'The State' Includes The Government And Parliament Of India And The Government And, The Legislature Of Each Of The States And All Local Or Other Authorities Within The Territory Of India Or Under The Control Of The Government Of India.").

<sup>4</sup>Khajoor Singh V. Union Of India Air 1961 Sc 532, Pratap Singh Khairon V. State Of Punjab Air 1964 Sc 72, State Of Bombay V. Laxmidas Air 1952 Born. 468.

<sup>5</sup> General Clauses Act § 3 (Lxi); Constitution Of India Sch. Vii, List Ii, Entry 5 ("Local Government, That Is To . Say, The Constitution And Powers Of Municipal Corporations, Improvement Trusts, Districts Boards, Mining Settlement Authorities And Other Local Authorities For The Purpose Of Local Self-Government Or Village Administration.").

<sup>6</sup> Rajasthan Electricity Board V. Mohanlal 1967 Scr (3) 377 (The Services Of The Permanent Employees Were Placed At The Disposal Of The Appellant, Electricity Board. While Framing Its Own Grades And Conditions For Promotions The Board Discriminated The Employees And This Matter Went In Appeal Before The Supreme Court From Madras High Court).

<sup>7</sup> Id.

## **Judicial Interpretation of ‘Other authorities’**

The most important question regarding the interpretation of Article 12 is the construal of the term ‘other authorities’ so that one can know as to what are the entities against which the fundamental rights can be claimed. The answer to this crucial question can be both broad and narrow, and whether one accepts either view largely depends on one’s notion about the reach of the fundamental rights.<sup>8</sup>

### **(a) Eiusdem Generis Rule**

Eiusdem generis rule is the first test devised by the Court to construe the meaning of ‘other authorities’ under Article 12. The expression ‘other authorities’ is used after mentioning government of India, State Government, Union legislature and State legislature and local authorities, it is thus reasonable to construe this expression in relation only to government or legislature.<sup>80</sup> If we apply this meaning it could only mean authorities exercising governmental or sovereign functions.<sup>81</sup> Thus to invoke the application of eiusdem generis rule, there must be a distinct genus or category running through the bodies already named.

This test was applied by Madras High Court in *University of Madras v. Shantha Bai*<sup>9</sup> wherein Madras High Court interpreted the term ‘other authority’ by applying the test of eiusdem generis and by applying this test it was held that only such authorities could be included within the term ‘other authorities’ as possessed governmental power. The Court also drew distinction between government aided and maintained institutions and held that University of Madras is an autonomous institution receiving aid not only from the government but also from private sources like collection of fees from the students and in such a case it cannot be held as a ‘State’ under Article 12.<sup>10</sup>

### **(b) Sovereign Power Test**

The criteria to find out authority as ‘other authority’ under Article 12 was further evolved in the case of *Rajasthan Electricity Board v Mohanlal*<sup>11</sup> wherein the Apex Court overruled *Shantha Bai* and declared incorrect its basic thesis that for the interpretation of ‘other authority’ in Article 12 eiusdem generis rule would be inapplicable because there

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<sup>8</sup>Hina Doon, *The Doctrine Of State Action ,The Politics Of Law Making*, Nalsar S.L.R. 1-21 (2009).

<sup>9</sup> In Simple Terms It Means That Where Certain Entities Which Are Specifically Enumerated Have A Common Characteristic And This Enumeration Is Followed By Some General Phrase Leaving Room To Include Some More, The Additional Cases To Be Covered In This Residuary Category Should Also Possess The Common Characteristic Of Possessing Power Of A Governmental Nature.

<sup>10</sup> Air 1954 Mad. 67 (The Question For Consideration Was Whether The Rule Of The University Restricting Admission On The Basis Of Sex Is Valid Or Not).

<sup>11</sup>1967 Scr (3) 3771.

was no common genus present in the authorities specially enumerated in the Article.<sup>12</sup> In the instant case Rajasthan Electricity Board was unanimously held to be a 'State.' But the uncertainty over the criteria to be adopted in holding an authority as State is also reflected in the opinion of the judges.

### **(c) Agency or Instrumentality of State Test**

The terms instrumentality or agency are not to be found place in Article 12. It is through the process of judicial that they have been included as falling within the net of Article 12 subject to satisfying certain tests. If we look into the definitions of instrumentality, Black's Law Dictionary defines instrumentality as "a means or agency through which a function of another entity is accomplished, such as a branch of governing body." Whereas agency is defined as "fiduciary relationship created by express or implied contract or by law, in which one party (the agent may act on behalf of another party (the principal and bind the other party by words or actions." Having referred the dictionary meaning it is important to analyze the judicial view in the interpretation of 'other authorities.'

The test of instrumentality or agency was put forward by Mathew J. in *Sukhdev Singh v. Bhagatram*.<sup>13</sup> The majority decision in *Rajasthan Electricity Board* was clearly the controlling precedent in this decision but the judges differed in its correct interpretation. Therefore the Corporations were State because they were statutory in origin and had been conferred with power to make regulations which had the status of law and law making is a sovereign power of the state. It is pertinent to note that only ONGC had the power to issue binding directions which could be made punishable as an offence, IFC and LIC does not possess such power. So Mathew J. relied on some other justification for calling corporations state relying on the functional aspect.

### **(d) Government Control Test**

The subsequent case in determining the criteria for 'other authority' was *R.D. Shetty v. International Airport Authority*.<sup>14</sup> The matter whether International Airport Authority was a State could have been decided by following the majority decision in *Sukhdev Singh*. But Bhagwati J. who delivered the judgment of the Court used the agency test as an alternative ground for the decision and pointed out that the corporations acting as

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<sup>12</sup> This View Was Further Reiterated In The Case Of B. W. Devadas V. The Selection Committee For Admission Of Students To The Karnatak Engineering College A.I.R 1964 Mysore 6 Wherein The Court Observed That: "There Is An Essential Difference Between A Political Association Of Persons Called 'The State' Giving Rise To Political Power Connoted By The Well-Known Expression 'Imperative Law' And A Non-Political Association Of Persons Created For Other Purposes By Contract, Consent Or Similar Type Of Mutual Understanding Related To The Common Object Of Persons So Associating Themselves Together Giving Rise To A Power Which Operates Not In The Manner In Which Imperative Law Operates, But By Virtue Of Its Acceptance By Such Associating Persons."

<sup>13</sup> AIR 1975 SC 1331

<sup>14</sup> 1979 SCR (3) 1014

instrumentality or agency of government would obviously be subject to the same limitations in the field of administrative and constitutional law as the government itself. It was also observed that there cannot be any 'cut and dried formula' for determining agency and instrumentality of state.

The following questions were held as important to determine whether a corporation is an instrumentality or agency of the government.

- a. Does the state give financial assistance to the corporation, if yes, to what extent?
- b. Is there any control of the management and policies of the corporation by the state if yes, the extent of such control?
- c. Does the corporation enjoy any monopoly status which is state protected or state conferred?

Establishment of cumulative effect of all the factors is necessary. The presence of only a single factor will not field a satisfactory answer.<sup>15</sup>

The subsequent decision was *Ajay Hasia v. Khalid Mujib*.<sup>16</sup> Since the question involved was whether a college registered under the Society's' Registration Act is an 'other authority' or not, the ratio in Sukhdev and International Airport Authority would have been become the obiter but Bhagwati J. by applying Instrumentality test held that college was a 'State.' From the beginning the Court relied on Governmental control as the determining test for Article 12. The most important aspect of the judgment lies in the matter that the court held that it is immaterial whether a particular entity was a statutory corporation created by law, or a government company incorporated in accordance with the provisions of Companies Act, 1956 or a mere registered society. What mattered was the substance, whether the particular entity had enough nexus with the government to be called it as an agency or instrumentality.<sup>17</sup>

Bhagwati J. specified the following six considerations to be taken into account in order to determine whether an 'authority' is an instrumentality or agency of State.

- (a) whether the entire share capital of the corporation is owned by the Government
- (b) whether the financial assistance given by the State is enough to cover the entire expenditure of the entity;

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<sup>15</sup> 1979 SCR (3) 1014

<sup>16</sup> 1981 AIR 487

<sup>17</sup> 1981 SCR (2) 79 At Para. 82

- (c) whether the Corporation enjoys a monopoly status which is either Government conferred or Government protected;
- (d) whether there is existence of deep and pervasive State control from the part of the Governmental;
- (e) whether the functions of the entity are of public importance or closely related to Governmental functions;
- (f) whether a Government department is transferred to a corporation.

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